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No.

SUPREME COURT, U. S.
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In the Supreme Court of the United States

JANUARY TERM, 1973

~~72-~~843

HARVEY J. POWERS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

PAGE

Opinion below 2

Jurisdiction 2

Question Presented 2

Constitutional Provisions 2

Statement of the Case 3

Reasons for Granting the Writ 8

The Government Assisted by Erroneous Evidentiary Rulings by the Trial Court Adopted Diametrically Opposed and Mutually Exclusive Factual Additions in Separate Criminal Cases. To Obtain Enforceable Convictions on Both Contradictory Theories; and Claimed Full Satisfaction on Both Judgments 8

Conclusion 17

Appendix A: Opinion of the United States Court of Appeals for the Seventh Circuit .....App. 1

Appendix B: Judgment of the Court of Appeals affirming judgment of the District Court, entered on September 12, 1972 .....App. 19

Appendix C: Order of November 8, 1972, denying Petition for Rehearing .....App. 20

LIST OF AUTHORITIES USED

Cases

PAGE

Alford v. United States, 282 U.S. 687, 691-693, 51 S. Ct. 218, 219, 75 S. Ct. 218, 219, 75 L. Ed. 264 9

Ashe v. Swenson, 397 U.S. 436 14

Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P. 2d 892 (1942) 14

Bruton v. U. S., 391 U.S. 123 (1968) 10

Buckstaff v. Russell & Co., 151 U.S. 626 10

Continental Oil Co. v. U. S., 184 F. 2d 802 12

Cook O'Brien Const. Co. v. Crawford, 26 F.2d 574 12

Curran v. State of Delaware, 259 F. 2d 707, 713 (3rd Cir. 1958) cert. denied 358 U.S. 948 15

DiAquino v. U. S., 9 Cir. 1951, 192 F. 2d 338, 374 10

Dixon v. U. S., 333 F. 2d 348 (1964) 9, 10

Guarantee Co. of North America v. Phoenix Ins. Co. (C.C.A.) 124 F. 170 12

Holder v. Hardy, 169 U.S. 366, 390-391 12

Hovey v. Elliot, 167 U.S. 409, 418 12

Lindsey v. U. S., 77 U. S. App. D.C. 1, 133 F. 2d 368 (1942) 10

Morgan v. U. S., 304 U.S. 1, 14-15 12

Philadelphia & W. B. R. Co. v. Howard, 13 How. 307 15

Powell v. Alabama, 287 U.S. 45, 68-70 12

Ross v. Morris, 328 F. 2d 3 (8th Cir., 1954) 15

PAGE

Sealfon v. U. S., 332 U.S. 575 14

Sinclair v. Jenkins, 99 F. 2d 9 (1st Cir., 1938) 14

Snyder v. Massachusetts, 291 U.S. 97, 116 12

U. S. v. Colonial Motor Co., 440 F. 2d 1227 (1920) 9

U. S. v. Santos, 372 F. 2d 177, 180 (2d Cir. 1967) 10

U. S. v. Cordillo, (2 C.A. 1963) 316 F. 2d 606, 610 10

Washington v. Texas, 388 U.S. 14, 19 11

Constitutional Provisions

Fifth Amendment to the United States Constitution ..2, 16

Sixth Amendment to the United States Constitution ..2, 16

Other Authorities

Rules of Evidence for United States District Courts and Magistrates (Preliminary Draft, 1969), Rule 8-01 (3) 14-15

American Bar Association Code of Professional Responsibility, Section EC 7-13 13

In the Supreme Court of the United States

JANUARY TERM, 1973

No.

HARVEY J. POWERS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Harvey J. Powers, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on September 12, 1972, affirming the judgment of conviction previously entered in the United States District Court for the Northern District of Illinois, Eastern Division. Petition for Rehearing was denied November 8, 1972.

OPINION BELOW

The judgment of the District Court is not reported. The opinion of the United States Court of Appeals for the Seventh Circuit has not yet been officially reported. It is reproduced as an Appendix to the Petition.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of conviction and sentence of the District Court was entered on September 12, 1972. Petition for Rehearing was denied on November 8, 1972. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254 (1).

QUESTION PRESENTED

Is the Government free to adopt diametrically opposed and mutually exclusive factual positions in separate criminal cases: to obtain enforceable convictions on both contradictory theory; and to claim full satisfaction of both judgments?

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, . . .

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STATEMENT OF THE CASE

This case involved a somewhat complex eight-count indictment for mail fraud and conspiracy against Harvey J. Powers, an attorney, and one Guido Fidanzi, a former client of Powers. Prior to trial, Fidanzi entered a plea of guilty and the case proceeded to jury trial as to Powers alone. (R. 40)[1] After a long and closely contested trial, the jury's verdict found Powers guilty of the specific mail fraud violation alleged in Count II of the indictment, while not guilty of conspiracy and of the substantive violations described in the other seven counts. (R. 58) Powers appealed from the trial judge's imposition of a sentence of incarceration in the custody of the Attorney General for a period of four years on Count II. (R. 65-66) The opinions of the Court of Appeals affirming his conviction over the vigorous dissent of Judge Stevens is reproduced as an Appendix hereto. Timely Petition for Rehearing was denied November 8, 1972.

Since the facts adduced during the trial are pertinent, only to a limited extent, we shall not attempt to be exhaustive about the evidence in the case. Substantially, those facts may be found in the two opinions filed in the Court of Appeals. Rather Judge Stevens' dissenting below has provided a succinct description of the fundamental facts necessary to a decision of the issues we present.

> Powers, an attorney, and Fidanzi, his client, were named as codefendants in each count of an eight-count indictment. Fidanzi entered a plea of guilty on all

[1] We have used the notation "R" to refer to the original documents filed in the District Court as compiled by the Clerk of that Court. We have used the notation "T" to refer to the Court Reporter's Transcript of Proceedings.

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eight counts. Powers' defense was that his participation was as a lawyer not a principal. The defense was successful on seven of the eight counts. With respect to the one count on which the jury found Powers guilty, the government introduced evidence tending to prove that he personally received the proceeds of two checks amounting to $2,240.00.

In a prior criminal proceeding, Fidanzi was convicted of wilfully failing to file an income tax return for the year 1964. In that trial the government charged that Fidanzi had unreported income of $11,240, including the proceeds of the two checks for $2,240 which were offered against Powers in this case. Thus, in the Fidanzi trial the government formally contended that the entire benefit of the $2,240 was Fidanzi's in the Powers trial the government formerly contended that the entire benefit of the same $2,240 was Powers'. The government successfully prevented Powers from bringing this inconsistency to the attention of the jury. Sl. Op. 13.

Because the holding of the Court below is premised upon its view of the record at trial, we will quote only the most germane portions of that record. During the direct examination of the government witness, Donald Blazavier, whose direct testimony was the only evidence adduced to show the personal receipt by Powers of the proceeds of any arguably fraudulent transaction, the witness repudiated his previous testimony in the former trial and insisted that it was Powers and not Fidanzi as he had previously stated who received the proceeds of the Beaird checks. (T. 426-429)

Counsel attempted to go further on the cross examination of Blazavier.

Mr. Bailey: I have a few more questions, Judge, about that trial.

By Mr. Bailey: Q. Were you aware when you testified there of the nature of that trial, sir? Did you know what the charge was?

Mr. Skinner: I object to that.

The Court: The objection is sustained.

* * *

The Court: * * * I don't mean by my ruling to prevent you from asking other questions, but the question that you've asked is objectionable and I sustained the objection, and I'm only ruling on the question that was asked, nothing further. If you have other questions in mind, proceed and I'll rule on any objections that may be made.

Mr. Bailey: I have no further questions. (T. 492-493)

Subsequently, before the witness was excused, but while no question was pending, the following side bar colloquy occurred:

Mr. Bailey: Well, Judge, what I think your Honor doesn't know is that the case against Guido Fidanzi was an income tax case for unreported income.

The Government in that case based on the testimony of this witness, that the checks went in his pocket, stuck Guido Fidanzi with this money as unreported income to him and used that evidence as the basis of a criminal conviction and a five-year sentence. I don't think the Government can stand up in one court in this building and say Guido got the money and then come

and stand up in another court in this building and say Powers got the money.

The Court: All right, you've laid the foundation for impeachment and proceed accordingly. That is all I can rule on here. I can't rule on anything else.

Mr. Bailey: What I wanted to know is whether this witness knows what is happening?

The Court: We are not concerned with what he knows.

Mr. Skinner: The jury evaluates the evidence.

The Court: Your question was objectionable and I sustained it.

Mr. Bailey: If that is your Honor's ruling—

The Court: Well, it is my ruling.

Mr. Bailey: But I want your Honor to be aware of all the facts that I am aware of.

The Court: Whether this witness is aware of anything on these things is not pertinent here. But the question that you put was objectionable and I sustained that objection. (T. 504-505)

Subsequently Special Agent Kurash of the Internal Revenue Service was called by the defense as a witness in their case-in-chief and the following occurred on direct examination.

Mr. Bailey: * * * Would you tell the court and the jury, Agent Kurash, how long you were assigned to investigate the tax liabilities of Guido Fidanzi?

Mr. Skinner: I object.

The Court: The objection is sustained.

Mr. Bailey: I have to be heard on this, Judge.

The Court: Oh, we don't have to be heard. I will sustain the objection.

By Mr. Bailey: Q. Did you eventually determine whether or not you would charge the proceeds of Government's Exhibits 6 and 6-A[2] to Guido Fidanzi as income to him, sir?

Mr. Skinner: Objection.

The Court: The objection is sustained.

Mr. Bailey: If I may, your Honor, this is the precise point that was involved yesterday. I want to argue—

The Court: I heard your statement yesterday, and I am sustaining the objection.

* * *

By Mr. Bailey: Q. What if any determination did you make, sir, in the Internal Revenue Service, about whether or not the proceeds of 6—Government's Exhibits 6 and 6A were income and to whom?

Mr. Skinner: Objection.

The Court: Sustained.

By Mr. Bailey: Q. Agent Kurash, sir did you on any previous occasion in this building, under oath, testify that the proceeds of Government's Exhibits 6 and 6A were chargeable as income to Guido Fidanzi?

Mr. Skinner: Objection.

The Court: The objection is sustained.

Mr. Bailey: No further questions. (T. 575-577)

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[2] Government Exhibits 6 and 6-A were the Beaird checks totalling $2,240.

REASONS FOR GRANTING THE WRIT

The Government, Assisted by Erroneous Evidentiary Rulings by the Trial Court, Adopted Diametrically Opposed and Mutually Exclusive Factual Positions in Separate Criminal Cases: To Obtain Enforceable Convictions on Both Contradictory Theories; and Claim Full Satisfaction on Both Judgments.

This Petitioner long a skilled and successful advocate, comes before this Honorable Court as a supplicant praying for the justice that has been denied him. A naturally difficult position is rendered more untenable by the Petitioner's knowledge that the system of jurisprudence to which he has devoted his adult life has condemned him most unfairly and he cries out that he has been cruelly used.

The issue in the instant case is simply stated, but its possible implications reach to the integral foundation of justice for an individual before the courts of the land. Simply stated, the question presented herein is: "Can the government adopt diametrically opposed and mutually exclusive factual positions in separate criminal cases: to obtain enforceable convictions on both contradictory theories; and claim full satisfaction of both judgments?"

The majority of the Court of Appeals in affirming this conviction clearly recognized the danger inherent in its opinion when it stated:

> We do not say, because we do not need to reach the questions, that the Government's position in a prior criminal trial may never be asserted in some form against the Government in subsequent criminal litigation. Sl. Op. 6.

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The majority opinion avoided this obviously volatile issue by ruling that the point was not properly raised since defense counsel had not preserved the issue by making a formal offer of proof during the cross examination of Blazavier. The majority in circuitously arriving at its desired result, stated:

> Thus, if the Defendant had made a record by appro- private offer of proof of the fact that the Government had successfully prosecuted Fidanzi for tax evasion in connection with his sole receipt of certain specified items of income, this being done in a case in which the Government was attempting to prosecute Powers for his sole receipt of the identical items of income, then notwithstanding the implication of cases such as *U.S.* v. *Santos,* 372 F.2d 177, 180 (2d Cir. 1967), we might give serious consideration to whether the offer to prove should not have been sustained on the basis at the very least that it concerned a judicial admission of the Government. Sl. Op. 6.

First, the court's utterance is illusory since it fails to take cognizance of the exploratory nature of cross-examination. It is not usually possible for counsel to state with precision the direction in which his questions may ultimately take the witness. It has been, therefore, the general rule that where restrictions on cross examination are involved, a Defendant need not show on appeal that he would win his case if permitted the right denied him. The rule that the cross examiner must indicate the purpose of his inquiry does not in general apply. *Alford* v. *United States,* 282 U.S. 687, 691-693, 51 S. Ct. 218, 219, 75 L. Ed. 624; *Dixon* v. *U.S.,* 333 F. 2d 348 (1964); *U.S.* v. *Colonial Motor Company,* 440 F. 2d 1227 (1970). A formal offer of proof, therefore, is not necessary where the record shows either from the form of the question asked

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or otherwise, what the substance of the proposed evidence is. *DiAquino* v. *U.S.*, 9 Cir. 1951, 192 F. 2d 338, 374; *Buckstaff* v. *Russell and Co.*, 151 U.S. 626.

The insistence of the majority opinion upon a formal offer of proof in a situation in which it was neither necessary nor required, and its similar insistence upon what dissenting Judge Stevens called "correcting any minor deficiencies in the form of questions . . ." Sl. Op. 15, footnote, deprived Petitioner of important and sensitive constitutional guarantees, e. g. his right to the effective and searching cross examination of Blazavier (confrontation) and his right to the testimony of Kurash in his own defense (compulsory process). The right of a defendant in a federal court to confront the witnesses against him, includes the right to test the truth of these witnesses' testimony by cross examination. *Bruton* v. *U.S.*, 391 U.S. 123, (1968); *U.S.* v. *Cordillo*, (2 C.A. 1963) 316 F. 2d 606, 610. *Dixon* v. *U.S.* (5 C.A. 1964) 333 F. 2d 348; *Lindsey* v. *U.S.*, 1942, 77 U.S. App. D.C. 1, 133 F. 2d 368.

The majority opinion then proceeded to avoid the central issue a second time by taking the very narrow view that the testimony of Agent Kurash was proffered for purposes of impeaching him as an individual witness by inconsistent statements made during the course of the exercise of his authority, and were thus improper questions when asked on direct examination to a government witness. *United States* v. *Santos*, 372 F. 2d 177, 180-181. Sl. Op. 8-9. This testimony was proffered, as indicated by Judge Stevens in his dissent, not for the purpose of proving that a government agent had made an admission which was binding on his principal, but rather for the purpose of explaining the position his principal had formally asserted in the trial of Fidanzi. Sl. Op. 15. The United States Government

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is an artificial sovereign entity and, as such, can only act through its agents. This sovereign entity has through Agent Kurash and others contrived to convict two of its citizens by relying on two distinct and inconsistent theories at two separate criminal trials. Consequently, the result is that the defense can only call this anomaly to the attention of the jury by questioning the agents who acted on behalf of their principal to effectuate the existing situation. The trial court denied the defense the right to present this witness and the exchange between the Court and defense counsel is clearly demonstrative that any further attempt to develop this line of inquiry would serve only to insult and anger the trial court.

The denial of the Petitioner's right to present his witness, Kurash, was a gross deprivation of his right to a fair trial. This Court in *Washington* v. *Texas,* 388 U.S. 14 at 19 stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. 388 U.S. 14 at 19.

This Court *in Re Oliver* further observed that:

> A person's right to reasonable notice of charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence, and these rights include, as a minimum, a right to examine the witnesses against him to offer testimony, and to be represented by counsel.

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The Court cited *Snyder* v. *Massachusetts,* 291 U.S. 97, 116; *Powell* v. *Alabama,* 287, U.S. 45, 68-70. *Hovey* v. *Elliott,* 167 U.S. 409, 418; *Holden* v. *Hardy,* 169 U.S. 366, 390-391; and *Morgan* v. *U.S.,* 304 U.S. 1, 14-15.

It is further interesting to note that the majority in discussing these two evidentiary rulings are not concerned with counsel for the Government properly preserving the point on appeal. In each of these two instances the objection of the Government is only general in nature which goes only to materiality or relevancy. *Continental Oil Co.* v. *United States,* 184 F. 2d 802; *Cook O'Brien Const. Co.* v. *Crawford,* 26 F. 2d, 574; *Morgan* v. *U.S.,* (C.C.A.), 169 F. 242; *Guarantee Co. of North America* v. *Phoenix Ins. Co.* (C.C.A.) 124 F. 170.

The door to the second evidentiary avenue, which was available to the jury, was thereupon slammed in the face of the defense by the trial judge. The effect of these evidentiary rulings by the trial court is to preclude an acquittal on this particular charge against Mr. Powers. The totality of the harm done to the defendant is apparent when it is noted that he was exonerated of the other seven charges enumerated against him in the indictment.

The crucial question on which the original appeal was based remains undecided. The majority avoided this question by an erroneous holding that the question was not properly before them. However, as demonstrated, the question was properly before them and it now appears as a result of this decision that the Government can now adopt diametrically opposed factual situations in separate criminal cases, to obtain enforceable convictions on both contradictory theories and to claim full satisfaction on both judgments.

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In the instant case, Blazavier, whose personal fortune, as well as that of his mother, was allegedly substantially diminished by the malefactions of Fidanzi and Mr. Powers was given permission to testify against both defendants in a diametrically opposite manner concerning identical factual situation. Certainly it can be supposed that Blazavier bore some ill feeling towards the defendant and Fidanzi. Moreover, there existed no possibility of a perjury indictment being brought against Blazavier since he testified for the Government.

The totality of the circumstances in the instant case can best be seen by establishing the following hypothetical situation:

> Assume that Blazavier instead of appearing as a prosecution witness had appeared as a defense witness in both cases. Assume further that in testifying for Fidanzi in the earlier trial, Blazavier testified that Mr. Powers received the $2,240.00 and then at the later trial while testifying on behalf of Mr. Powers he said that a conversation with his wife refreshed his recollection and Fidanzi not Mr. Powers received the monies. It can be imagined the great alacrity with which the Government would secure an indictment for perjury against Blazavier.

What is supposedly an adversary proceeding has been reduced to a sham. A prosecutor bears a responsibility not only to the community, but to the defendant as well. The Code of Professional Responsibility adopted by the American Bar Association contains the following provisions with respect to the duties of a public prosecutor.

> EC 7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty

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> exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts . . .

The Petitioner in his brief on appeal argued that the District Court erred in refusing to give effect in the case at bar to the fundamentally inconsistent positions the government had previously espoused in prior litigation for two reasons.

First, that the doctrine of collateral estoppel was applicable in this criminal case. *Ashe* v. *Swenson,* 397 U.S. 436; *Sealfon* v. *U.S.,* 332 U.S. 575, as there existed sufficient mutuality and privity of parties under the doctrine of *Bernhard* v. *Bank of America,* 19 Cal. 2d 807, 122 P. 2d 892 (1942). The holding in *Sinclair* v. *Jenkins,* 99 F. 2d 9 (1st Cir. 1938) was to the effect that a party to a lawsuit may not deny to the prejudice of another party a position taken in a prior lawsuit if that position were successfully maintained. The government was successful in its prosecution of Fidanzi to the extent that a five-year sentence was imposed.

Secondly, the Petitioner based his contention on the evidentiary principle that the admission of a party to a lawsuit made through its authorized agent is inadmissible in evidence when offered by that party's opponent to prove a material issue of fact in the case. Rules of Evidence for

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United States District Courts and Magistrates (Preliminary Draft, 1969, Rule 8-01 (3); *Philadelphia & W. & B. R. Co.* v. *Howard,* 13 How. 307; *Ross* v. *Morris,* 328 F. 2d 3 (8th Cir. 1954).

However, both arguments evolve into the contention that the government cannot ignore the factual position it took in its successful prosecution of Fidanzi and depart from that position to the prejudice of the Petitioner here. This basic issue is explained most cogently in Judge Stevens' dissent when he states: "I believe, however, that a more basic issue is raised when the sovereign itself takes inconsistent positions in two separate criminal proceedings against two of its citizens." Sl. Op. 14

As Chief Justice Biggs so aptly phrased it, this procedure passes beyond the line of tolerable imperfection and falls into the field of fundamental fairness. *Curran* v. *State of Del.,* 259 F. 2d 707, 713 (3rd Cir. 1958) cert. denied 358 U.S. 948.

The prosecution, as an agent of the sovereign, has taken two inconsistent positions in two separate criminal proceedings against two of its citizens. A designated sum of monies, $2,240.00, at two different criminal trials formed the basis for conviction of two different citizens. At the time of each citizen's conviction the evidence supposedly demonstrated beyond a reasonable doubt that each defendant did alone receive the money. It is a fundamental principle of physics that two different entities of matter cannot occupy the same space at the same time; therefore, it must be assumed that one of these two citizens was innocent. Moreover, since it was established at Fidanzi's trial, beyond a reasonable doubt, that he received said monies, then Mr. Powers could not be convicted of the same offense.

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We note in this connection that the government made no attempt to reopen the Fidanzi case although upon the view of the facts it had asserted in the Court below, Fidanzi's conviction must at this point be based, in part, at least, upon evidence that is totally inaccurate if nothing else. So the government continues to seek advantage from two contrary accounts of the same incident by the same witness in *seriatim* prosecutions. If truly the conflict resulted from recollection later refreshed and truth subsequently discovered, the government might well have been expected to stand up in some court or other and seek the benefit of later discovered truth for one of its citizens, Fidanzi, if not Powers.

The fundamental fairness guaranteed by the Fifth and Sixth Amendments to the United States Constitution have been denied the Petitioner. More important perhaps is that the government will feel that the case constitutes a carte-blanche invitation to repeat the procedure which initiated the instant Petition. The true lesson of the panel majority opinion, will not be lost on the Government: the Government is not responsible for its action in any sense, and is therefore free to behave with ultimate irresponsibility.

The Government in its prosecutorial fervor invidiously discriminated against the constitutional guarantees of Mr. Powers and this action was compounded by the judiciary in the form of the trial court and the majority opinion. The judicial conscience cannot possibly countenance this gross betrayal of every concept of fundamental fairness on which this legal system is established. The defendant now stands before this Court and prays that the grave injustice done him be remedied.

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CONCLUSION

For the foregoing reasons, we respectfully petition this Court to issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1971 — APRIL SESSION, 1972

No. 18454

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

HARVEY J. POWERS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 69-CR-133 — ALEXANDER J. NAPOLI, *Judge.*

ARGUED APRIL 27, 1972 — DECIDED SEPTEMBER 12, 1972

Before PELL and STEVENS, *Circuit Judges,*
and LARAMORE,* *Senior Judge.*

PELL, *Circuit Judge:* Harvey J. Powers, an attorney, and his client, Guido Fidanzi, were named in an eight-count indictment charging in the first seven counts various fraudulent acts of federal cognizance and in the eighth count, conspiracy concerning the fraudulent acts. Fidanzi

* Senior Judge Don N. Laramore of the United States Court of Claims is sitting by designation.

pleaded guilty prior to trial. Powers was tried in a jury trial and was found guilty on Count II only, in connection with alleged mail fraud pursuant to 18 U.S.C. § 1341, pertaining primarily to one Bennie Beaird. This appeal followed.

The briefs of both Powers and the Government, presumably for differing influential purposes, have provided us with a scenario of the trial testimony showing the machinations of the defendants with numerous individuals and corporations. The parade of names and events, mostly having nothing to do with the points involved on this appeal, reads like an inadequate translation of a Tolstoi novel.

Some of the operations at least were handled through a corporation modestly named World Wide Mortgage Company. The extent of the financing as reflected by the evidence appears to have been the securing of advance finder's fees from persons who desired capital for high-risk business ventures, following which the further efforts to secure the loan evaporated along with the advance payment.

The specific count on which Powers was convicted involved an aborted loan to Beaird, a Peoria business man. He sought to borrow $100,000 to buy stock in a fast food franchise operation which sold "barbecued pork things." Beaird testified that he had several meetings with Fidanzi and Powers as to the possibility of arranging such a personal loan; that Powers had always participated extensively in the discussions, often referring to what substantial sums of money World Wide had access to; and that after negotiations they had agreed on a $112,000 loan ($100,000 principal and $12,000 as a finder's fee, *i.e.*, "12 points"). On December 12, 1964, Beaird and his partner, Lester Shallenberger, met Fidanzi and Powers and signed a loan

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agreement contract which provided that the advance fee less $100 would be refunded if World Wide failed to obtain the loan. Beaird and Shallenberger each gave Powers a certified check for $1120 (totaling $2240, or 2% of $112,000). Powers put the checks in his coat pocket and that was the last Beaird ever saw of either Powers or Fidanzi.

In order to tie Powers into the fraud as an active participant and not just as the attorney for Fidanzi and/or World Wide, the Government adduced the testimony of Donald Blazavier.

Blazavier, whose testimony displays an excessively consistent guilelessness and a continuing willingness to part with his own or his mother's money in exchange for unkept promises, was apparently an employee of World Wide in December, 1964, although it is not clear that he was ever on the payroll. During the period of his association with World Wide, Fidanzi gave the Beaird checks to Blazavier to cash at a nearby bank — specifically telling him not to mention World Wide. After endorsing the checks, Blazavier was told by a teller that she could not cash them. Blazavier then returned the checks to Fidanzi.

At this point in his testimony, we reach one of the points raised on this appeal. In an earlier trial of Fidanzi for filing a fraudulent income tax return and for wilful failure to file returns[1] (No. 67 CR 561, *aff'd*, 411 F.2d 1361 (7th Cir. 1969), *cert. denied*, 396 U.S. 929), Blazavier had testified, "Mr. Fidanzi put both of those checks [following the unsuccessful bank sortie] into his wallet and that was all I heard of it."

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[1] Some of the income at least which the Government contended should have been reported was achieved through the swindling manipulations which were the subject of the present indictment.

However, in the trial below, he testified that conversations with his wife had refreshed his recollection and that a few days later he had been given the checks again by Fidanzi and told to take them up to his hometown bank in Kenosha, Wisconsin, to cash them. This he did and he then turned over the proceeds, less $100 he had held out for his services, to Powers who was driving through, purportedly on the way to a closing in Milwaukee where the money was to be used. Blazavier was subjected to a searching cross-examination on this inconsistency.

The following then occurred:

> MR. BAILEY: I have a few more questions, Judge, about that trial.
>
> BY MR. BAILEY: Q. Were you aware when you testified there of the nature of that trial, sir? Did you know what the charge was?
>
> MR. SKINNER: I object to that.
>
> THE COURT: The objection is sustained.
>
> * * * * *
>
> THE COURT: * * * I don't mean by my ruling to prevent you from asking other questions, but the question that you've asked is objectionable and I sustained the objection, and I'm only ruling on the question that was asked, nothing further.
>
> If you have other questions in mind, proceed and I'll rule on any objections that may be made.
>
> MR. BAILEY: I have no further questions.

Subsequently, before the witness was excused, but while no question was pending, the following side bar colloquy occurred:

> MR. BAILEY: Well, Judge, what I think your Honor doesn't know is that the case against Guido Fidanzi was an income tax case for unreported income.
>
> The Government in that case based on the testimony of this witness, that the checks went in his pocket, stuck Guido Fidanzi with this money as unreported

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income to him and used that evidence as the basis of a criminal conviction and a five-year sentence. I don't think the Government can stand up in one court in this building and say Guido got the money and then come and stand up in another court in this building and say Powers got the money.

THE COURT: All right, you've laid the foundation for impeachment and proceed accordingly. That is all I can rule on here. I can't rule on anything else.

MR. BAILEY: What I wanted to know is whether this witness knows what is happening?

THE COURT: We are not concerned with what he knows.

MR. SKINNER: The jury evaluates the evidence.

THE COURT: Your question was objectionable and I sustained it.

MR. BAILEY: If that is your Honor's ruling —

THE COURT: Well, it is my ruling.

MR. BAILEY: —but I want your Honor to be aware of all the facts that I am aware of.

THE COURT: Whether this witness is aware of anything on these things is not pertinent here. But the question that you put was objectionable and I sustained that objection.

As a part of the direct testimony of the defense, Special Agent Kurash of the Internal Revenue Service was called as a witness. Powers cites us to the following portions of the transcript in connection with the testimony of Kurash:

MR. BAILEY: * * * Would you tell the court and the jury, Agent Kurash, how long you were assigned to investigate the tax liabilities of Guido Fidanzi?

MR. SKINNER: I object.

THE COURT: The objection is sustained.

MR. BAILEY: I have to be heard on this, Judge.

THE COURT: Oh, we don't have to be heard. I will sustain the objection.

BY MR. BAILEY: Q. Did you eventually determine whether or not you would charge the proceeds

of Government's Exhibits 6 and 6-A to Guido Fidanzi as income to him, sir?[2]

MR. SKINNER: Objection.

THE COURT: The objection is sustained.

MR. BAILEY: If I may, your Honor, this is the precise point that was involved yesterday. I want to argue —

THE COURT: I heard your statement yesterday, and I am sustaining the objection.

* * * * *

BY MR. BAILEY: Q. What if any determination did you make, sir, in the Internal Revenue Service, about whether or not the proceeds of 6—Government's Exhibits 6 and 6A were income, and to whom?

MR. SKINNER: Objection.

THE COURT: Sustained.

MR. BAILEY: One moment, your Honor.

BY MR. BAILEY: Q. Agent Kurash, sir, did you on any previous occasion in this building, under oath, testify that the proceeds of Government's Exhibits 6 and 6A were chargeable as income to Guido Fidanzi?

MR. SKINNER: Objection.

THE COURT: The objection is sustained.

MR. BAILEY: No further questions.

The foregoing matters are the basis of Powers' most significant contention for reversal. As stated by him, the district court erred in refusing to give effect to the fundamentally inconsistent positions the Government has previously espoused. We do not agree.

We do not say, because we do not need to reach the question, that the Government's position in a prior criminal trial may never be asserted in some form against the Government in subsequent criminal litigation.

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[2] Government Exhibits 6 and 6-A were the Beaird checks totalling $2,240.

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Thus, if the defendant had made a record by appropriate offer to prove of the fact that the Government had successfully prosecuted Fidanzi for tax evasion in connection with his sole receipt of certain specified items of income, this being done in a case in which the Government was attempting to prosecute Powers for his sole receipt of the identical items of income, then notwithstanding the implications of cases such as *United States* v. *Santos,* 372 F.2d 177, 180 (2d Cir. 1967), we might have to give serious consideration to whether the offer to prove should not have been sustained on the basis, at the very least, that it concerned a judicial admission of the Government. The offered proof, of course, would have to go beyond the mere fact of an indictment. *Cf. Falter* v. *United States,* 23 F.2d 420 (2d Cir. 1928), *cert. denied,* 277 U.S. 590.

But this is not the situation before us although in his argument Powers would have us consider his case as substantially similar in legal effect to that postured above.

As a matter of fact, Powers first contends that the Government was collaterally estopped in his case because of the prosecution of Fidanzi. Even if we were to hold that the doctrine of collateral estoppel could be applied to a situation where there was a lack of mutuality of parties, *cf. Ashe* v. *Swenson,* 397 U.S. 436 (1970), and even if the matter of the prior litigation had been properly presented on the record below, the doctrine of collateral estoppel would not be appropriate here as Powers' trial did not involve the relitigation of an ultimate fact.

Collateral estoppel, as defined in *Ashe* v. *Swenson,* "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U.S. at 443. There is no such

inconsistency between Fidanzi's conviction on the tax case and Powers' claimed guilt in the present case. First, it is clear that the jury in Fidanzi's tax case could have found that his income was in excess of $600 without attributing the two checks in question to him since there was another $9,000 in income charged to him by the Government. But, equally important is the fact that Powers could have been guilty of mail fraud in this case without ever having received any of the proceeds of the check. One does not have to share in the proceeds of a crime to be guilty of the crime.

There is no necessary inconsistency between money being handed to one person and liability for not paying tax on that money being chargeable to another person who was the ultimate recipient.

More fatal, however, to Powers' contention, either on a collateral estoppel basis or on his secondary basis that evidence of the claimed Governmental inconsistent position should have gone before the jury for whatever weight it might have as a judicial admission, is the state of the record before us. The Government concedes on this appeal that the underlying facts which Powers' counsel *told* the judge about at a side bar conference might have been significant as reflecting a negation of a motive of personal gain on the part of Powers derived, if it was a fact, from the non-receipt of the money as his own income.

Turning to the record which we have quoted hereinbefore, we first look at Blazavier's cross-examination. The only questions asked to bring in the point here asserted were whether the witness was aware of the nature of the trial or what the charge was.

The objection could properly have been sustained as to the particular question because of its duplicitous nature.

The witness may have been aware of the nature of the trial but not have known with the charge was and therefore he would have been unable to respond either in the affirmative or the negative.

However, of greater significance to the present contention is that this double question simply had no significance. We can find no materiality in whether the witness did or did not know of the nature or of the charge of the previous case in which he had testified. We cannot assume that a witness tells other than the truth in response to questions, irrespective of the nature of the litigation.

The district court did not prohibit, indeed did not even chill, a proper pursuit of the subject. He stated he was ruling "on the question that was asked, nothing further." He told counsel if he had other questions to proceed. Counsel had no further questions.

It is true that subsequently at a side bar conference, Powers' counsel *told* the judge that Fidanzi had been charged in the tax case with the receipt of that income. Again, he was informed that the question he had put was objectionable. The matter was not pursued and as we have already observed the only other aspect of Blazavier's testimony here, the inconsistency between the two trials, was brought out by way of impeachment.

The cited attempt to bring in the matter by testimony of Special Agent Kurash was equally nonproductive on the point that Powers on appeal contends is involved. The questions put to Kurash, to which objections were sustained, do not tend to prove that the Government, as opposed to one of its employees, had taken an inconsistent position.

The first in the series of questions as to how long Kurash had been assigned to the Fidanzi tax investigation was apparently only isagogic and while innocuous also did not in the prohibition of its answer give rise to any error.

The second and third questions pertained to the agent's determination as to whether the proceeds of the Beaird checks were taxable income to Fidanzi and whether they were income and to whom.

The determination of the agent falls squarely within the rule enunciated in *United States* v. *Santos, supra,* which we adopt. The objections to these questions were properly sustained.

The fourth question asked the agent whether on a previous occasion he had testified that the proceeds of the Beaird checks were chargeable as income to Guido Fidanzi. If the agent had testified in the Powers trial as an adverse witness to the contrary of that which he had testified in the Fidanzi case, then the question would have assumed the proportions of a foundation for impeaching him as a witness. Kurash, however, had not testified in the Powers case, indeed, was Powers' own witness and not, as such, subject to impeachment by Powers.

Santos would seem to say that inconsistent statements of a Government agent made in the course of the exercise of his authority would be admissible only for the purpose of impeachment of the agent as an individual witness. Reasons of policy are advanced for differentiating the Government agent from the ordinary agent. 372 F.2d at 180.

Even if we were to say here, however, that the fourth question was an initial step in testamentary development of proof that the Government, as opposed to any individual

agent thereof, had taken an inconsistent position earlier with regard to the checks, while it is questionable that the fourth question really opens that door at all, the fact remains that after the question was asked no further attempt was made whatsoever to follow up or to pursue this line of proof. We do not conceive that the rulings here were such as to chill some reasonable effort at making a record. Instead, no further interrogation occurred, and there was no offer of proof whatsoever as to what the answers would have been if the witness had been permitted to answer the questions. No effort was made to ask the agent questions concerning the overall prosecution of Fidanzi by the Government. At best the questions were keyed to Kurash's personal evaluations and opinions which would not be in themselves binding on the Government.

We cannot say on the posture of the record before us that there was plain error requiring reversal. Rule 52(b), Fed. R. Crim. P.

Finally, on a subsequent day in the trial, Powers moved to strike the testimony of Blazavier to the effect that he had paid the proceeds of the two checks to Powers. This testimony might have been subject to impeachment and the impeaching matter had been presented to the jury. Inconsistency in testimony given in a trial with earlier statements in court or out of court is not ordinarily a basis for striking the testimony and it was not here.

The presentation, however, of the motion to strike was supported by a copy of the Government's brief on the appeal of the Fidanzi tax case to this court. This brief contained statements which were the only matters coming at all close to the point Powers is asserting on the present appeal. However, the brief was put before the court only as an exhibit to the motion which was properly overruled.

The entire colloquy on the motion was out of the presence of the jury and the brief was not offered into evidence in the trial.

We conclude therefore that the matter here urged was not presented in such a manner as to bring the question before us. We do not consider the matter as being one of plain error under Rule 52(b), Fed. R. Crim. P. Our holding is not on the case that might have been but on the record before us. Consequently we have not found it necessary to consider the arguments of the Government, irrespective of the merit they may have, that the determination of the tax incidence of the proceeds of the Beaird checks could not be used as an admission because they were not inconsistent with the Government's position in the present fraud case.

The other contentions of Powers merit less extended consideration.

One of these concerned excluded testimony of a former assistant state's attorney that at a time some two years after the last date established in the Government's proof and almost two years after Powers, according to his own testimony, had discovered Fidanzi's fraud and had severed all connection with him, Powers had told the assistant state's attorney that Fidanzi had used his name in the perpetration of various frauds. Powers asserts that the testimony should have been admitted to show his good faith.

While the district court's announced characterization of the proposed testimony as "self serving" would seem to be a questionable basis for exclusion (*see, e.g., Smith* v. *United States*, 385 F.2d 252, 254 (8th Cir. 1967)), we cannot say that exclusion of the statements made as remotely

after the fact as here was an abuse of the wide discretion permitted to the judge in this situation. *See Hayes* v. *United States*, 227 F.2d 540, 543 (10th Cir. 1955).

Powers' final contention concerns the cross-examination of James Doherty, the first of the defendant's nine character witnesses. On direct examination Doherty testified that Powers had a good reputation "in the community of which both he and yourself are a part" for honesty and integrity, and for truthfulness and veracity. It would appear that reference was to the legal rather than the residence community. On cross-examination the prosecutor sought to test the witness' credibility by asking whether he "had heard that [the defendant] had three complaints pending before the Chicago Bar Association?" The witness answered the question, denying knowledge of the complaints, before defense counsel objected. The court sustained the objection. No motion for a mistrial was made. There, of course, was no motion to strike the answer for if anything it was favorable to the defendant. There was no motion that the jury be admonished to disregard the question. No further reference to these complaints was made during the examination of Powers' other eight character witnesses or at any point in the trial. The defendant on appeal claims that "[t]he very asking of that question was plain error requiring the trial judge to declare a mistrial." We do not agree.

We note that the ruling of the district court is arguably questionable. In *Michelson* v. *United States*, 335 U.S. 469, 483 (1948), the Supreme Court in dealing with an analogous matter stated:

> "The inquiry as to an arrest is permissible also because the prosecution has a right to test the qualifications of the witness to bespeak the community opinion. If one never heard the speculations and rumors

in which even one's friends indulge upon his arrest, the jury may doubt whether he is capable of giving any very reliable conclusions as to his reputation."

A complaint before the bar association, if publicly known to the legal community, would, like an arrest, be an accusation of misconduct, which although untested would be an event about which lawyers would normally comment. Furthermore, complaints before the bar association would seem to be directly relevant to the defendant's reputation for those traits of honesty and integrity which were expressly put in issue.

We also note that the jury was given the customary instruction that the jury should not consider testimony to which an objection had been sustained.

We need not decide whether the judge's ruling on the question was proper, however, for under the circumstances of lack of motion for mistrial, no motion to admonish the jury to disregard the question, and lack of any showing of any significance being attached to the particular question during the remainder of the trial, we are not prepared to say it was plain error requiring reversal. Rule 52(b), Fed. R. Crim. P.

For the reasons hereinbefore set out the judgment of the district court is affirmed.

AFFIRMED.

STEVENS, *Circuit Judge*, dissenting: Powers, an attorney, and Fidanzi, his client, were named as codefendants in each count of an eight count indictment. Fidanzi entered a plea of guilty on all eight counts. Powers' defense was that his participation was as a lawyer, not a principal. The defense was successful on seven of the eight counts. With respect to the one count on which the jury found Powers guilty, the government introduced evidence tending to prove that he personally received the proceeds of two checks amounting to $2,240.

In a prior criminal proceeding, Fidanzi was convicted of wilfully failing to file an income tax return for the year 1964. In that trial the government charged that Fidanzi had unreported income of $11,240, including the proceeds of the two checks for $2,240 which were offered against Powers in this case. Thus, in the Fidanzi trial the government formally contended that the entire benefit of the $2,240 was Fidanzi's; in the Powers trial the government formally contended that the benefit of the same $2,240 was Powers'. The government successfully prevented Powers from bringing this inconsistency to the attention of the jury.

Because of the difference in parties, and because neither of the inconsistent positions was essential to either verdict, I agree that no estoppel barred the second trial or, indeed, the government's change of position. I also assume that the mere fact that a government agent had placed a particular interpretation on a past transaction, and either gave testimony or executed an affidavit setting forth that interpretation, would not be admissible except to impeach that agent. *Cf. United States* v. *Santos*, 372 F.2d 177, 180-181 (2d Cir. 1967). I believe, however, that a more basic issue is raised when the sovereign itself takes inconsistent

positions in two separate criminal proceedings against two of its citizens.[1]

The inconsistency may be justified or explained by newly discovered evidence or by more accurate analysis of facts which were always available. But in my opinion the fact of the inconsistency may properly be brought to the attention of the jury and the government put to the burden of explaining how it could argue that the same transaction can prove, beyond a reasonable doubt, two mutually exclusive propositions. I think Powers was entitled to prove that the government had formally contended, in the course of a criminal trial resulting in the conviction of Fidanzi, that the entire proceeds of the checks for $2,240 constituted income to Fidanzi.[2]

There is no question in my mind that Powers' inability to bring this fact to the attention of the jury may well have been the critical difference between his conviction and his possible acquittal. The defect in the record was one "affecting substantial rights" of the defendant within Rule 52(b), Fed. R. Crim. P. Moreover, Powers' theory

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[1] The United States, like other inanimate persons, must, of course, act through its agents. However, just as formal action by a board of directors may clearly evidence the position of a corporation, so does the formal prosecution of a criminal trial establish the position of the United States and not merely the views of its agents who participate therein.

[2] In his argument to the jury in the Fidanzi trial, government counsel stated:

> "For '64 we charged $11,240 and we proved just that. He received a gross income of $11,240. He was supposed to file a return, he knew it, and he didn't, and he wilfully failed to file." Tr. 829, *United States* v. *Fidanzi*, 411 F.2d 1361 (7th Cir. 1969).

of admissibility was plainly explained to the trial court.[3] The narrow issue which then remains is whether any of the questions propounded by Powers' counsel for the purpose of proving the position taken by the government in the Fidanzi trial should have been answered.

Having concluded that the ultimate proposition which Powers sought to establish was relevant, I also conclude that one proper method of bringing this matter to the attention of the jury was through the testimony of the government agent, Kurash, who not only had analyzed the specific transaction but also testified at the Fidanzi trial. Powers proffered his testimony,[4] not as in *Santos* for the purpose of proving that a government agent had made an admission which was binding on his principal, but rather for the purpose of explaining the position his principal had formally asserted in the trial of Fidanzi. I believe

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[3] "MR. BAILEY: Well, Judge, what I think your Honor doesn't know is that the case against Guido Fidanzi was an income tax case for unreported income. The Government in that case based on the testimony of this witness, that the checks went in his pocket, stuck Guido Fidanzi with this money as unreported income to him and used that evidence as the basis of a criminal conviction and a five-year sentence. I don't think the Government can stand up in one court in this building and say Guido got the money and then come and stand up in another court in this building and say Powers got the money." Tr. 504.

[4] Kurash was the first witness called by the defense; thus, the admissibility of his testimony, unlike the questions propounded to Blazavier, was not limited by the scope of the government's examination or by the court's discretion as to the proper limits on cross-examination.

the proffered testimony of Kurash should have been received.[5]

I therefore respectfully dissent. I would reverse and remand for a new trial.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

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[5] Moreover, since the trial judge indicated that he considered this line of inquiry irrelevant after having been advised of Powers' theory of admissibility (Tr. 504-05, 575-76), I am satisfied that no useful purpose would have been served by any further attempts to make an adequate record for appeal. Indeed, proper respect for the trial judge's position should excuse trial counsel from the necessity of correcting any minor deficiencies in the form of the questions already put.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

September 12, 1972

Before

HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*
HON. DON N. LARAMORE, *Senior Judge, Court of Claims*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 18454 vs.

HARVEY J. POWERS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX C

In the

United States Court of Appe

For the Seventh Circuit

Chicago, Illinois 60604

November 8, 1972

Before

HON. WILBUR F. PELL, *Circuit Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*
HON. DON N. LARAMORE, *Senior Judge**

UNITED STATES OF AMERICA,

Plaintiff-Appell

No. 18454 vs.

HARVEY J. POWERS,

Defendant-Appell

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

No. 69-CR-133 — Alexander J. Napoli, Judge

On consideration of the petition of appellant, Harvey Powers for rehearing and suggestion of rehearing *en ba* in the above entitled appeal, and, no member of the p and no judge in regular active service having reque that a vote be taken on the suggestion for an *en banc* hearing, and the panel having voted to deny a rehear

IT IS ORDERED that the petition of the appellant fo rehearing and suggestion of rehearing *en banc* in the ab entitled appeal be, and the same is hereby denied.

* Senior Judge Don N. Laramore of the United States Court Claims is sitting by designation.